



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2004

Mr. David K. Walker
County Attorney
Montgomery County
207 W. Phillips
Conroe, Texas 77301

OR2004-10852

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215507.

The Montgomery County Sheriff's Department (the "department") received a request for eight categories of information pertaining to a specified department officer. You state that the department has produced some of the requested information for the requestor. You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, 552.119, and 552.140 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.²

¹ We note that although the department did not claim that any portion of the remaining requested information is excepted from disclosure under section 552.119 of the Government Code within ten business days of its receipt of the request for information, we will consider the department's claim under this exception to disclosure since such a claim constitutes a compelling interest that is sufficient to overcome any existing presumption that the portions of the remaining requested information to which this claim pertains are now public. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You claim that the submitted information contains medical record information, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Based on your arguments and our review of the submitted information, we have marked the medical record that is subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold this marked record pursuant to the MPA.

We note that a portion of the remaining submitted information constitutes mental health record information that is subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of the remaining submitted information, we have marked the information that constitutes mental health record information that is subject to chapter 611 of the Health and Safety Code. Absent the

applicability of a mental health record access provision, the department must withhold this marked information pursuant to chapter 611 of the Health and Safety Code.

We also note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.³ Section 1701.306 makes declarations of medical condition and of psychological and emotional health confidential and provides:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306. Based on our review of the remaining submitted information, we have marked the information that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

You also claim that a portion of the remaining submitted information constitutes a Department of Defense Form DD-214 (the "DD-214 form") that is excepted from disclosure pursuant to section 552.140 of the Government Code. Section 552.140 provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). You have not indicated the date on which this form first came into the possession of the department. Consequently, we must rule in the alternative. If this date was on or after September 1, 2003, the department must withhold the marked form under section 552.140. If this date was before September 1, 2003, the department may not withhold any portion of the form on the basis of section 552.140 of the Government Code. In the event that the date was before September 1, 2003, we will otherwise address the public availability of this form in the remainder of this ruling.

In addition, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy.⁴ Information is protected from disclosure by the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Prior decisions of this office have found that the following types of information are also protected from disclosure by the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history); certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Based on your arguments and our review of the remaining submitted information, we have marked

⁴ Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy.

the information that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Further, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to subsections 552.108(b)(1) and (b)(2) of the Government Code. Section 552.108(b) provides in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; or

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(1), (b)(2). Generally speaking, subsection 552.108(b)(1) is mutually exclusive of subsection 552.108(b)(2). Subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. In contrast, subsection 552.108(b)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication.

Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibits pattern that reveals investigative techniques, information is excepted under section 552.108), 341 (1982) (release of certain information from DPS would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

However, in order for a governmental body to claim this exception to disclosure, it must meet its burden of explaining how and why release of the requested information would

interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were different from those commonly known). Whether disclosure of particular records will interfere with law enforcement or prosecution must be decided on a case-by-case basis. *See* Attorney General Opinion MW-381 (1981).

You indicate that the release of portions of the remaining submitted information would interfere with law enforcement and jeopardize the safety of department officers. Based on your arguments and our review of the remaining submitted information, we find that the department has adequately demonstrated that the release of some of this information, which we have marked, would interfere with law enforcement or crime prevention or would otherwise jeopardize the safety of department officers. *See* Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts). Accordingly, we conclude that the department may withhold this particular marked information pursuant to section 552.108(b)(1) of the Government Code. However, we also find that the department has failed to adequately demonstrate how or why subsection 552.108(b)(1) or subsection 552.108(b)(2) is applicable to any other portion of the remaining submitted information. Accordingly, we also conclude that the department may not withhold any other portion of the remaining submitted information under section 552.108 of the Government Code.

We also note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer, or that reveals whether the peace officer has family members, regardless of whether the officer complies with section 552.024 or section 552.1175.⁵ Gov't Code § 552.117(a)(2). Based on our review of the remaining submitted information, we have marked the information that the department must withhold pursuant to section 552.117(a)(2) of the Government Code.

In addition, you claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.119 of the Government Code. Section 552.119 excepts from disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. *See* Gov't Code § 552.119. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a

⁵ Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 2.12.

case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. Section 552.119 also provides that a photograph excepted from disclosure under this section may be made public, only if the peace officer gives written consent to the disclosure. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that the release of the particular information at issue would endanger the life or physical safety of the depicted officer. Accordingly, we conclude that the department may not withhold any portion of the remaining submitted information under section 552.119 of the Government Code.

Finally, we note that portions of the remaining submitted information are copyrighted. We note that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, absent the applicability of an access provision, the department must withhold the information that we have marked pursuant to the MPA and chapter 611 of the Health and Safety Code. The department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The department must also withhold the DD-214 form that we have marked pursuant to section 552.140 of the Government Code, if the form first came into the possession of the department on or after September 1, 2003. In addition, the department must withhold the information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department may withhold the information that we have marked pursuant to section 552.108(b)(1) of the Government Code. Further, the department must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code. The department must release the remaining submitted information to the requestor; however, in doing so, the department must comply with the applicable copyright law for the portions of this information that are copyrighted.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 215507

Enc. Marked documents

c: Ms. Vickie Bigham
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 (w/o enclosures)